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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JAMES DAVIS BENNETT,

Plaintiff and Appellant,

v.

FLAGSTAR BANK, INC., et al.,

Defendants and Respondents.

B222611

(Los Angeles County
Super. Ct. No. BC 388092)

APPEAL from the judgment of the Superior Court of Los Angeles County.
Elizabeth Allen White, Judge. Affirmed.

James Davis Bennett, in pro. per., for Plaintiff and Appellant.

Quinn Emanuel Urquhart & Sullivan, John P. D'Amato, Jon Steiger and Jon
Christian Cederberg for Defendant and Respondent Flagstar Bank, Inc.

Bensinger, Ritt, Tai & Thvedt and D. Jay Ritt for Defendant and Respondent
Phillip A. Trevino.

Plaintiff James David Bennett filed this lawsuit after he was convicted and sentenced to 121 months in federal prison for bank and wire fraud. He sued Flagstar Bank, one of the victims of his fraud, and Phillip Trevino, his court-appointed appellate attorney. Plaintiff now appeals from the trial court's denial of his motion for summary judgment and entry of summary judgment for Flagstar Bank. He also appeals from the trial court's order vacating entry of the default against defendant Trevino and sustaining Trevino's demurrer without leave to amend. We affirm.

BACKGROUND

A. Plaintiff's Conviction of Bank and Wire Fraud in the Underlying Action

The underlying criminal proceedings are described in the opinion of the Ninth Circuit Court of Appeals vacating the conviction of plaintiff on three counts of bank fraud as to Equicredit Corporation. Plaintiff did not appeal his conviction of the counts of bank fraud involving Flagstar Bank, and those convictions stand. (*United States v. Bennett* (9th Cir. 2010) 621 F.3d 1131.) We quote portions of the Ninth Circuit's opinion below:

"James Bennett -- a mortgage broker, real estate appraiser, and escrow agent -- operated a sophisticated property flipping scheme in Southern California. 'A fraudulent property flip is a scheme in which individuals, businesses, and/or straw borrowers buy and sell properties among themselves to artificially inflate the value of the property.' Fed. Fin. Inst. Examination Council, *The Detection and Deterrence of Mortgage Fraud Against Financial Institutions* 36 (Apr. 2010) ('FFIEC Report'). A Federal Bureau of Investigation report explains:

Property flipping is best described as purchasing properties and artificially inflating their value through false appraisals. The artificially valued properties are then repurchased several times for a higher price by associates of the 'flipper.' After three or four sham sales, the properties are foreclosed on by victim lenders. Often flipped properties are ultimately repurchased for 50 to 100 percent of their original value.

Financial Crimes Section, F.B.I., *Financial Crimes Report to the Public* (FY 2007). 'This scheme is designed to extract as much cash as possible from the property,

and the loan proceeds are often used for purposes not stated on the application.’ FFIEC Report at 36.

“Bennett identified multi-unit buildings that were listed for sale in low-income neighborhoods in Los Angeles and Long Beach. He provided his family members with cash to purchase the properties at their listed market price. He then identified ‘straw purchasers’ to repurchase the same properties from his family members at drastically inflated prices. Sometimes, the straw purchasers were Bennett's associates or family members, and at other times, they were unwitting participants who were lured into the transactions by lucrative incentives, such as cash rebates and zero-money-down mortgages.

“Bennett facilitated the sale of the properties from the initial buyers to the straw purchasers. He began by appraising the properties at 30% to 50% above their fair market value. Then, acting as the mortgage broker, he helped the straw purchasers obtain mortgages in the amounts of the inflated property values. The documents that he submitted to various lending institutions to acquire the mortgages were replete with misrepresentations about the properties and the borrowers. Not only did he inflate the appraised value of the properties, but he also misrepresented their potential rental income and fabricated grant deeds and title reports to conceal his family members’ involvement with the properties. He also submitted false information about the borrowers’ employment statuses and incomes so that they would qualify for mortgages that otherwise would be denied. Finally, acting as the escrow agent, Bennett used falsified copies of cashier’s checks and deposit forms to represent that deposits had been made to escrow accounts, when, in fact, they had not.

“Bennett ensnared several lending institutions in his web of lies. Provided with false information about the properties and borrowers, these institutions were duped into issuing mortgages to the straw purchasers. Bennett profited in an amount equal to the difference between the mortgage proceeds fraudulently obtained from the lender and the amount paid in cash to acquire the property at its market price. Meanwhile, many of the

straw purchasers defaulted on their mortgages, typically within months of the transaction, leaving the lenders to foreclose on the properties at a loss.

“... In January 2003, a federal grand jury returned an indictment against Bennett and several of his associates for ‘execut[ing] a scheme to defraud mortgage lenders and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises.’ In September 2005, the grand jury returned a superseding twelve-count indictment against Bennett only. The indictment charged Bennett with four counts of wire fraud under 18 U.S.C. §§ 2(b) and 1343 and seven counts of bank fraud under 18 U.S.C. § 1344. Each of the wire fraud and bank fraud counts involved a different mortgage for a different property in Southern California. The twelfth count of the superseding indictment charged Bennett with operating a continuing financial crimes enterprise in violation of 18 U.S.C. § 225.

“In January 2006, a jury convicted Bennett on all twelve counts. Bennett moved for judgment of acquittal, which was granted as to the twelfth count because the government failed to introduce evidence that Bennett received \$5 million or more from the enterprise, as required by statute. *See* 18 U.S.C. § 225(a)(2). The district court denied Bennett’s motion for judgment of acquittal as to all other counts.

“Bennett appeals only his convictions as to counts eight through ten, which charged him with bank fraud arising out of mortgages obtained from Equicredit on three different properties in Long Beach; Bennett does not contest his convictions or sentence on counts one through seven or count eleven.” (*United States v. Bennett, supra*, 621 F.3d at pp. 1133-1136.)

B. Plaintiff’s Lawsuit Against Flagstar Bank and Trevino

In March 2008, plaintiff sued Flagstar for fraud, claiming its employees gave false information and testimony to the FBI, the grand jury, and the jury that convicted him. Plaintiff alleged Flagstar’s employees falsely stated that Flagstar was the lender on three mortgage transactions and, without that false testimony, he would not have been convicted of the three counts of bank fraud involving Flagstar. The trial court denied plaintiff’s motion for summary judgment on his cause of action against Flagstar and

granted Flagstar's summary judgment motion, finding the fraud cause of action against Flagstar was barred by the litigation privilege and collateral estoppel.

Plaintiff also sued his court-appointed appellate counsel, Trevino, for malpractice. Trevino did not timely respond to the complaint, for reasons described below, and plaintiff obtained entry of Trevino's default, which the trial court set aside. Thereafter, the trial court sustained Trevino's demurrer without leave to amend.

DISCUSSION

1. The Trial Court Properly Denied Plaintiff's Motion for Summary Judgment and Granted Flagstar's Motion for Summary Judgment.

The legal principles governing our review (which, on summary judgment, is *de novo*) are these.

a. Litigation privilege

The litigation privilege applies to any communication “ ‘ (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.” ’ ” (*Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 616-617.)

The courts construe the litigation privilege broadly to protect a litigant's right of access to court without fear of being harassed by later tort actions. (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 37; *Healy v. Tuscan Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5.)

The litigation privilege protects statements made in criminal proceedings, including a victim's report of a crime, statements made during the law enforcement investigation, testimony given to the grand jury, and testimony given in any criminal prosecution. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360-361, 364, 375-376; *Irwin v. Murphy* (1933) 129 Cal.App. 713, 716.) Since all of the statements made by Flagstar representatives were made in connection with the reporting of a crime to law enforcement officers, the subsequent FBI investigation, and in-court proceedings, Flagstar is protected by the litigation privilege from having to defend against plaintiff's fraud claim.

There are four statutory exceptions to the litigation privilege. The first exception is limited to certain proceedings for marital dissolution or legal separation (Civ. Code, § 47, subd. (b)(1)), which does not apply to this case. The second exception is limited to communications made in furtherance of intentionally destroying or altering physical evidence (Civ. Code, § 47, subd. (b)(2)), which plaintiff did not allege in this case. The third exception is limited to knowing concealment of an insurance policy (Civ. Code, § 47, subd. (b)(3)), which does not apply to this case. The fourth exception is limited to the recording of certain lis pendens (Civ. Code, § 47, subd. (b)(4)), which does not apply to this case.

b. Collateral estoppel

Plaintiff claims Flagstar's representatives fraudulently concealed that Flagstar was not the initial lender but rather purchased the loans from Long Beach City Mortgage. He did not appeal his conviction of the three counts involving Flagstar, and the issues necessarily decided in those counts have been finally and conclusively decided against plaintiff. Collateral estoppel precludes relitigation in a civil action of any issue necessarily decided by a court of competent jurisdiction in a criminal proceeding. (*Smith v. State Farm Mut. Auto. Ins. Co.* (1992) 5 Cal.App.4th 1104, 1115; *Miller v. Superior Court* (1985) 168 Cal.App.3d 376, 381.) A conviction of bank fraud under Title 18 United States Code section 1344(2) requires proof beyond a reasonable doubt that Flagstar was a financial institution and the victim of a scheme to fraudulently obtain money. The federal statute does not require proof that Flagstar was the initial lender. Plaintiff cannot relitigate whether he was wrongly convicted of bank fraud upon Flagstar because it has been conclusively decided that Flagstar was a victim of plaintiff's fraud in violation of federal law, whether or not Flagstar was the initial lender.

Accordingly, the trial court properly denied plaintiff's motion for summary judgment and granted Flagstar's motion for summary judgment on the basis of the litigation privilege and collateral estoppel.

2. The Trial Court Properly Vacated Entry of Default Against Trevino.

The legal principles governing our review are these.

There is a strong policy in favor of deciding cases on the merits. (*Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1488.) “Because the law favors disposing of cases on their merits, ‘any doubts in applying [Code of Civil Procedure] section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits. [Citations.]’ ” (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980; see also *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 256.) Any conflict between the principle that the trial court’s determination is presumed correct and the principle favoring a trial on the merits should be resolved in favor of a trial on the merits. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 703.)

The trial court correctly relieved Trevino from his failure to timely respond to the complaint. We briefly summarize the circumstances that prompted Trevino to refrain from filing a timely response to the complaint. After plaintiff’s conviction of mail and bank fraud, the Ninth Circuit appointed counsel to represent plaintiff on appeal. Plaintiff wanted to represent himself, but there is no right to self-representation before the Ninth Circuit, and the Ninth Circuit was aware that plaintiff had engaged in repetitive and meritless litigation tactics that made his attempt at self-representation a burden on the court. The Ninth Circuit ordered the Federal Public Defender’s office to find a qualified private attorney to handle the appeal. Shortly after an attorney was assigned, plaintiff sued him and the head of the Federal Public Defender’s office. The Ninth Circuit allowed that attorney to withdraw from representing plaintiff. Trevino then accepted the appointment to represent plaintiff on appeal, despite being warned that plaintiff had sued his previous lawyer and various judges and other court personnel.

Trevino’s act of professional responsibility did not go unpunished. Plaintiff sued Trevino and the Ninth Circuit commissioner who recommended against allowing plaintiff to represent himself in federal court. The federal court dismissed that action. Plaintiff then filed this suit against Trevino, who then sought leave of the Ninth Circuit to withdraw from representing plaintiff on appeal while simultaneously appearing adversely

to plaintiff in this action. The Ninth Circuit found plaintiff was engaged in a campaign of filing frivolous lawsuits against the lawyers appointed to represent him and denied Trevino's request, reasoning that, if Trevino were relieved and a new lawyer appointed, plaintiff would just sue that lawyer. Instead, the Ninth Circuit stayed the appeal pending the resolution of this lawsuit.

Trevino had not answered the complaint for many reasons, including his concern to avoid a conflict of interest with plaintiff; the dismissal of plaintiff's claims against other lawyers, which led Trevino to expect the claims against him would also be dismissed; his conclusion he had not been properly served; and another defendant's removal of the case to federal court. The federal court dismissed some parties but remanded the claims against Trevino to the superior court. Plaintiff obtained entry of Trevino's default shortly after the remand, and Trevino promptly took steps to set aside the default. Manifestly, on these facts, the trial court properly exercised its discretion to vacate the default.

3. The Trial Court Properly Sustained Trevino's Demurrer Without Leave to Amend.

Plaintiff alleged two causes of action against Trevino, one for malpractice and one for fraud. After the trial court vacated the entry of default, Trevino demurred, and the trial court sustained the demurrer without leave to amend. The legal principles governing our review of the sustaining of the demurrer, which is de novo, are these.

A criminal defendant may not sue his attorney for malpractice unless he is actually innocent of the crimes. (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 536 [in a criminal malpractice action *actual innocence* is a necessary element of the plaintiff's cause of action].) To show actual innocence, the criminal defendant must allege and prove that his conviction has been reversed on appeal or through post-conviction relief, or he has otherwise been exonerated. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201 (*Coscia*).) Plaintiff did not allege he was actually innocent of the crimes of which he was convicted.

An essential element of a fraud cause of action is damages caused by the fraud. Plaintiff could not allege damages proximately caused by Trevino unless he could also allege (which he did not) actual innocence and that his conviction had been reversed on appeal or through post-conviction relief or he has otherwise been exonerated. (~~See id.~~ See *Coscia, supra*, 25 Cal.4th at p. 1201 [“public policy considerations require that only an innocent person wrongly convicted be deemed to have suffered a legally compensable harm”].)

Accordingly, the trial court properly sustained Trevino’s demurrer without leave to amend.

DISPOSITION

The judgments in favor of Flagstar and Trevino are affirmed. Respondents are to recover their costs on appeal.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.